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Supreme Court, U.S.
FILED
JUL 17 2003
OFFICE OF THE CLERK

No. 02-1315

IN THE

Supreme Court of the United States

GARY LOCKE, MARCUS GARSPAD, BOB CRAVES, JOHN KLACIK, *et al.*,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN JEWISH CONGRESS, ON BEHALF OF ITSELF, THE AMERICAN FEDERATION OF TEACHERS, THE AMERICAN JEWISH COMMITTEE, AND THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS

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AMICI CURIAE BRIEF of the AMERICAN JEWISH CONGRESS, AMERICAN FEDERATION OF TEACHERS, AMERICAN JEWISH COMMITTEE, and the BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS

Interest of the *Amici*

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, religious and economic rights of American Jews. It has taken an active role in challenging the provision of government aid to religious institutions.

* * *

The American Federation of Teachers, AFL-CIO ("AFT") is a national labor union which represents over 1.2 million members who work in public schools, community colleges, universities, state government and health care. Over 120,000 AFT members work in higher education. Since its founding in 1916, AFT has filed numerous amicus briefs in this Court on First Amendment, as well as civil and labor rights issues. We continue that tradition with this case.

* * *

The American Jewish Committee ("AJC"), a national human relations organization with over 125,000 members and supporters and 33 regional chapters, was founded in 1906 to protect the civil and religious rights of Jews. A staunch defender of church-state separation as the surest guarantor of religious liberty for all Americans, AJC

supports the right of the State of Washington to maintain a stricter separation than that required by the federal Constitution and to decline to fund the study of theology in keeping with that stricter separation.

* * *

The Baptist Joint Committee on Public Affairs ("BJC") is a religious liberty organization, serving fourteen cooperating Baptist conventions and conferences in the United States. BJC deals exclusively with religious liberty and church-state separation issues and believes that vigorous enforcement of both the Establishment and Free Exercises Clauses is essential to religious liberty for all Americans. In accordance with this understanding of the Constitution, the BJC joined a petition seeking rehearing of the *Employment Division v. Smith* decision and an *amicus* brief on behalf of the prevailing party in the *Good News Club v. Milford Central School District* case.

We join as amici in this case because we believe that the decision below misconstrues the constitutional principles that protect religious liberty. BJC believes that the Free Exercise Clause protects religious practice from governmental interference, but contemplates no right of state subsidization of it. Further, we disagree with the lower court's dismissive approach toward the State's interest in upholding its own constitutional ban against the support of religion and the characterization of that interest as hostility toward religion.

SUMMARY OF ARGUMENT

1. The decision below inverts the question in financial aid to religion cases from "is the aid permissible" to "is the aid compulsory." In the course of so holding, the Ninth Circuit cast into doubt the viability of the constitutions of over half the states.

2. This Court, in cases such as *Norwood v. Harrison*, 413 U.S. 455, 462 (1973), *Wheeler v. Barrera*, 417 U.S. 402 (1974), *Leutkemeyer v. Kaufmann*, 364 F.Supp. 376 (W.D. Mo. 1973), aff'd, 419 U.S. 888 (1974) and *Brusca v. Missouri ex rel. State Bd. of Educ.*, 332 F.Supp. 275 (E.D. Mo. 1971), aff'd, 405 U.S. 1050 (1972), acknowledged that states were free to deny aid to religious school students that they provided to secular school students. Some of these decisions (*i.e.*, *Leutkemeyer*) came over dissents making the same 'discrimination against religion' argument as Respondent makes here.

3. These results are a product of this Court's recognition that the religion clauses of the First Amendment are not an either/or proposition–that is, it is not the case that whatever is not forbidden (or mandated) by one clause is mandated (or forbidden) by the other. There is "play in the joints," interstitially, for legislators to widen or contract the gap between religion and state without violating the Free Exercise Clause, precisely as the legislature may expand the scope of religious accommodation without violating the Establishment Clause.

4. This Court recognized the existence of "play in the joints" in *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

State and federal courts (including the Washington Supreme Court) have likewise applied the concept to both Establishment and Free Exercise claims.

5. Congress, too, has repeatedly enacted statutes recognizing the validity of "play in the joints," including "play" which denies aid to religious institutions and their students, even though the aid would not violate the Establishment Clause. These statutes include the Elementary and Secondary Schools Assistance Act, 20 U.S.C. § 6320(e); the National School Lunch Program Act, 42 U.S.C. § 1756(b); the recently enacted No Child Left Behind Act, 20 U.S.C. § 7217(a)(d)(i) and *id.* at § 7882; and the first "charitable choice" law, 42 U.S.C. § 604(a)(k).

6. "Play in the joints" is appropriate where:

(i) religious groups are not relegated to outlaw status, as by denial of basic protective services;

(ii) there is no discrimination between religious groups;

(iii) the policy falls into an area of reasonable doubt, not where the clear import of the federal constitution bars the practice in question, and the concerns the state addresses are real, not (as was the case in *McDaniel v. Paty*, 435 U.S. 618 (1978)), prophylactic rules averting illusory harms.

7. Given the constitutional roots of a ban on aid to religious education, and the rule that the bare denial of a subsidy to a constitutionally protected activity is not an unconstitutional penalty, *U.S. v. American Library Ass'n*, 123 S.Ct. 2297 (2003), *Rust v. Sullivan*, 500 U.S. 173 (1991), *Regan v. Taxation With Representation*, 461 U.S. 540 (1983),

Washington's refusal to fund theology majors falls within a gray area and is constitutional.

8. Where "play in the joints" is the appropriate rule, compelling interest analysis is inapposite. None of the cases on which the judgment below rests are inconsistent with this conclusion.

9. The Free Exercise Clause is written in terms of what the "government cannot do to the individual, not what the individual can exact from government," *Lyng v. Northwest Indian Protection Ass'n*, 485 U.S. 439 (1988). *Sherbert v. Verner*, 374 U.S. 398 (1963) (whose author, Justice Brennan, joined in the summary affirmance in *Leutkemeyer*), did not involve the transfer of funds to any religious institution. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), involved a rare effort at regulatory suppression of a particular church.

Rosenberger v. Rector, 515 U.S. 819 (1995), was by its terms limited to non-tax funds, to an organization this Court said was not "a religious institution as that term as used in our case law." Moreover, unlike here, in *Rosenberger* the state's interest was in creating a robust forum for speech, not in subsidizing individuals seeking an education. A state's refusal to subsidize theology training is well within the scope of the reasonable. At the least, states ought to be free, on this disputed ground, to experiment. *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003).

10. Washington is not seeking to suppress religious ideas. A student is not denied a subsidy for taking religion courses or attending a college whose curriculum is permeated with religious ideas. The State only withholds a

subsidy for theological training as such; it has not committed religious ideas to an ideological gulag.

11. While there is no doubt that Washington's constitutional provision emerged as part of the 19th century controversy over funding Catholic education, it does not follow that it was impermissibly motivated by anti-Catholicism. To be sure, pure anti-Catholic bigotry existed, and played a role in the controversy. However, the overriding fact was that the Catholic Church in the 19th century was officially opposed to church-state separation. These views were stated in widely known Papal encyclicals (one labeled separation "absurd," and another, "insanity"). The idea of separation was condemned by the Syllabus of Errors (No. 55). Opponents of this ordering of church-state relations were entitled to forestall the possibility of a drastic reordering of the American church-state settlement with stringent anti-aid provisions without being condemned, retroactively, as bigots.

ARGUMENT[1]

I. HISTORY AND PRECEDENT ARGUE AGAINST CONSTITUTIONALLY MANDATED FINANCIAL SUBSIDIES

The modest tone of the judgment below belies its broad sweep. In invalidating a single aspect of one state's college aid program, the court below almost certainly invalidated constitutional provisions in at least 29, and

1. No person, organization or corporation other than the named *amici* and their counsel assisted in, or contributed to, the preparation or filing of this Brief.

perhaps as many as 37, states,[2] numerous federal and state statutes, considered opinions of this, and other federal and state courts, and settled political and public understandings.

The court below did not respect the settled tradition of allowing states limited discretion to determine whether to fund religious enterprises even where that funding is compatible with the federal Establishment Clause. Instead, it discerned in the First Amendment an unyielding uniform rule of equal funding of secular and religious beneficiaries. All contrary state constitutional provisions were likely invalidated in one fell swoop, as relics of a by-gone era of anti-religious animus, notwithstanding that numerous Justices of this Court–including several now sitting–were, and are, similarly minded.

If the judgment below is affirmed, the question in financial aid to religion cases will no longer be, as it has been, "is this aid permissible or forbidden?" It will be instead "is this aid forbidden or required?" That fundamental restructuring of the legal framework for deciding Establishment Clause cases would startle generations of judges, lawyers, politicians and academics.

A. Precedents Of This Court Grant States Discretion Not To Fund Religious Education

Norwood v. Harrison, 413 U.S. 455, 462 (1973), noted that the Constitution did not require states to provide

2. I.C. Lupu and R.W. Tuttle, Government Partnerships With Faith-Based Providers (2002) at 37; S.K. Green, Stars in the Constitutional Constellation (1993)

religious schools or their students all the aid the Establishment Clause permits.

> Even assuming . . . that the Equal Protection Clause might require state aid to be granted to private non-sectarian schools in some circumstances–health care or textbooks ... a State could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance.

That 'rational conclusion' violates the First Amendment under the decision below.

In *Wheeler v. Barrera*, 417 U.S. 402 (1974), this Court wrestled with Missouri's administration of the Elementary and Secondary Schools Assistance Act (ESSA), which required an equitable expenditure of federal funds to benefit religious school students. The statute also obligated federal authorities to respect restrictive state constitutional provisions (such as those of Missouri). Pronouncing the Establishment Clause issues difficult, this Court insisted the case was not ripe, as it might be possible to accommodate both statutory requirements. On the decision below, however, there was no conflict to resolve. Missouri's restrictive constitutional provision unconstitutionally discriminated against religion.

Decisively on point are the decisions of three-judge courts in *Leutkemeyer v. Kaufmann*, 364 F.Supp. 376 (W.D. Mo. 1973), aff'd, 419 U.S. 888 (1974) (bus transportation); *Brusca v. Missouri ex rel. State Bd. of Educ.*, 332 F.Supp. 275, 276 (E.D. Mo. 1971), aff'd, 405 U.S. 1050 (1972) (ban on aid

to religious schools); and *DiCenso v. Robinson*, 316 F.Supp. 112 (D. R.I. 1970), aff'd *sub nom*, *Lemon v. Kurtzman*, 403 U.S. 621 (1971), cases discussed only in passing by the court below. Each squarely presented the question presented here–whether the Free Exercise or Equal Protection Clause requires a state to provide aid permissible under the federal Establishment Clause.

Brusca held neither Clause did so because, "to the extent the Religion Clauses of the First Amendment do not prohibit ... financial aid, they do not require that it be given ...." *Leutkemeyer* reached the same conclusion although noting that most states rejected Missouri's astringent attitude toward religious school aid. In *Leutkemeyer* and *Brusca*, plaintiffs cited *Sherbert v. Verner*, 374 U.S. 398 (1963), for the identical proposition that Respondents here cite *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993): that the exclusion of religious school students from a program of aid available to secular school students is an impermissible penalty on religious observance.

Judge Gibson, a member of the *Leutkemeyer* court, authored a dissent presaging the opinion below. The summary affirmance in *Leutkemeyer* came over the dissents of two Justices urging similar claims. 419 U.S. 888. Affirmances in *Leutkemeyer*, *Brusca* and *DiCenso* enjoy full precedential weight, *Hicks v. Miranda*, 422 U.S. 332 (1975). They should not have been overridden by the court below. *Agostini v. Felton*, 521 U.S. 203, 237 (1997). *Brusca*, *Leutkemeyer* and *DiCenso*, moreover, were decided in the early 1970's amidst a vigorous national debate and much litigation over aid to religious schools in the name of equal

treatment and in the wake of *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

A review of this Court's decisions upholding aid to parochial schools shows that they habitually frame the issue as whether the Establishment Clause "prevent[s] a state from extending the benefits of state laws to all citizens," not whether the Constitution requires the extension of such assistance. See, e.g., *Allen*, *supra*, 392 U.S. at 242, citing *Everson v. Bd. of Educ.*, 330 U.S. 1, 17 (1947). Not a word in either *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), *Mitchell v. Helms*, 530 U.S. 793 (2000), *Agostini v. Felton*, *supra*, or *Mueller v. Allen*, 463 U.S. 388 (1983) so much as hints that legislatures are required by the Constitution (contrary to *Norwood*) to extend equipment subsidies or tuition benefits available to secular school students to those attending religious schools. The repeated framing of the issue in a way that assumes legislative discretion reflects a widespread, if not explicitly stated, understanding that legislatures retain a measure of discretion to narrow or widen the gap between church and state.

B. The Court Has Recognized "Play In The Joints" In The Religion Clauses

The refusal to impose an either/or straitjacket on the Religion Clauses is no accident, nor an artifact of decisions which are abandoned hulks on the sea of the law. Rather, the existence of limited discretion in legislatures to fund or not fund religious enterprises reflects this Court's consistent approach to the Religion Clauses.

Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970), rejected the claim that a real property tax exemption for

churches established religion.[3] In the course of explaining why this Court observed:

> Mr. Justice Harlan expressed something of this in his dissent in *Sherbert v. Verner* ... saying that the constitutional neutrality ... "is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation." .... The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. .... [T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

397 U.S. at 668, 669 (citations omitted) (emphasis added).

If there were no room for "play in the joints," and if all religion specific rules were subject to compelling interest analysis as the court below held, *Davey v. Locke*, 299 F.3d 748, 758-60 (9th Cir. 2002), then the discretionary religious exemptions invited by *Employment Division v. Smith*, 494 U.S. 872, 890 (1990) would be unconstitutional on the

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3. The exemption of religious institutions is not constitutionally mandated. *Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990).

theory that they prefer to draw religious lines without compelling justification.

That position is not trivial. It was advanced by Professor Phillip Kurland[4] and urged by at least two Justices of this Court–Justice Harlan in *Welch v. U.S.*, 398 U.S. 333, 356 (1970) (concurring opinion)[5] and Justice Stevens in *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (concurring opinion).[6] Yet even as it held that the Free Exercise Clause does not require exemption from neutral laws, this Court left states free to adopt discretionary exemptions applicable to religious objectors only without requiring a showing of compelling interest. See *Employment Division v. Smith*, *supra*; *Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

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4. P. Kurland, Religion and the Law: Of Church and State and the Supreme Court (1962).

5. But see Justice Harlan's concurrences in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *School District of Abington Twslip. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg and Harlan, J.J.).

6. Several courts, reading *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), just as literally as the court below, have questioned or invalidated religion-specific exemptions. *Congregation Kol Ami v. Abington Township*, 309 F.3d 120 (3rd Cir. 2002); *Madison v. Riter*, 240 F.Supp.2d 566 (W.D. Va. 2003), appeal pending (4th Cir. 2003); *Al-Ghashiyah v. Wis. Dep't of Corrections*, 250 F.Supp.2d 1016 (E.D. Wis. 2003), appeal pending (7th Cir. 2003). The fundamental error of these courts is in ignoring "play in the joints," and imposing a rigid either/or framework on the First Amendment.

If "play in the joints" exists for legislative protection of free exercise beyond any constitutional mandate, then there can, and should, be "play in the joints" with regard to non-establishment as well.

C. State Courts Acknowledge "Play In The Joints"

The existence of "play in the joints" reflect a long-standing constitutional tradition of states enforcing stricter limits on the subsidization of religion than required by the federal Constitution. Concomitantly, and despite plausible countervailing Establishment Clause concerns, see pp. 9-10, *supra*, several states enforce stricter free exercise limits on government than does the federal Constitution. See, *e.g.*, *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990).

The federal Constitution permits states to provide transportation *(Everson v. Bd. of Educ.*, 330 U.S. 1 (1947)) and textbooks (*Board of Educ. v. Allen*, 392 U.S. 236 (1968)) to parochial school students. A majority of states provide such aid. Others, however, do not, rejecting claims that their more restrictive church-state policies violate federal Free Exercise or Equal Protection guarantees.[7] Similarly, while

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7. As to school busing, in addition to cases cited in Point I.A., *supra*, see, *e.g.*, *Healy v. Independent School Dist.*, 1991 U.S. Dist. LEXIS 20958 (D. Minn. 1991); *Franc v. South Bend Community School Corp.*, 480 N.E.2d 261 (Ind. App. 1985); *McCarthy v. Hornbeck*, 590 F.Supp. 936 (D. Md. 1984); *Cook v. Griffin*, 47 A.D.2d 23, 364 N.Y.S.2d 632 (App. Div. 4th Dept. 1975). As to textbooks, see, *e.g.*, *Fannin v. Williams*, 655 S.W.2d 480 (Ky. 1983); *California Teacher's Ass'n v. Riles*, 29 Cal.3d 794, 176 Cal. Rptr. 300, 632 P.2d 953 (1981); *Paster v. Tussey*, 512 S.W.2d 97

the federal Constitution permits issuance of revenue bonds for religious institutions, *Steele v. Industrial Development Bd.*, 301 F.3d 401 (6th Cir. 2002), some states forbid them under their own constitutions. *Board of County Comm'rs v. Idaho Health Facilities Auth.*, 531 P.2d 588 (Idaho 1974).

Washington State's constitution illustrates "play in the joints." It provides greater protection for both free exercise and non-establishment than does the federal Constitution. "[T]he Washington courts have interpreted [the state constitution] to provide broader protection for free exercise of religion than its federal counterpart, yet simultaneously to provide a greater separation of church and state." R.F. Utter and H.D. Spitzer, The Washington State Constitution: A Reference Guide (2002).

In *Witters v. State Comm'n for the Blind*, 112 Wash.2d 363, 771 P.2d 1119 (1989), the Washington Supreme Court held that, even though granting vocational aid to a theology student would not violate the federal Establishment Clause, *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986), it would not deny any federally protected right to enforce a stricter state non-establishment rule.[8]

(Mo. 1974); *Elbe v. Yankton Indep. Sch. Dist.*, 372 N.W.2d 113 (S.D. 1985). For additional cases in various contexts, see *Snyder v. Charlotte Public School Dist.*, 123 Mich. App. 56, 333 N.W.2d 542 (Ct. of App. 1983) (dual enrollment); *Valencia v. Blue Hen Conference*, 476 F.Supp. 809 (D. Del. 1979) (athletic league).

8. Almost simultaneously with the decision below, the Washington Supreme Court, *State ex rel. Gallwey v. Grimm*, 146 Wash.2nd 445, 48 P.3d 274 (2002), recast its reading of the state constitution so that it is now closer to the rule of *Zelman v.*

This diversity of opinion is unsurprising. Justices of this Court are divided on where to mark the boundary between church and state when government offers financial aid to religious institutions. Considerations of federalism, and modesty in not assuming that one's judgment about debatable subjects is correct, cautions against reading the federal Constitution to homogenize church-state relationships to a monochromatic federal standard.

D. Congress Is Cognizant Of "Play In The Joints"

In addition to insisting on "play in the joints," *Walz* teaches another relevant lesson–that in interpreting the First Amendment a "page of history" is worth more than volumes of logic, 397 U.S. at 676. A particularly "strong case" must be made out to invalidate practices which are long-standing and widespread. On the evidence of long-standing congressional practice, that burden cannot be sustained here.

Simmons-Harris, supra. To the extent that the rule attacked here was justified under a reading of the state constitution *Gallwey* rejects, it may be appropriate to certify to the Washington Supreme Court, Rev. Code of Washington § 2.60, the question of whether the challenged regulation is still required to comply with the Washington constitution.

Davey registered for a double major, one of which was secular and would have sustained a scholarship independently of his theology major. The court below seems to have paid no attention to this fact, which suggests a narrower basis for decision: that Davey was penalized for having an additional religious major, even though his secular major alone would have sustained his eligibility for a grant.

Congress has repeatedly acknowledged the constitutional legitimacy of differing state constitutional policies regarding the funding of religious education, a policy entitled to substantial weight. ESSA, enacted on the heels of *Sherbert*, *supra*, was the first federal statute providing educational benefits to religious school students. L. Pffefer, Church, State and Freedom (2d ed. 1967) at 601-604.

Although the Act aided religious school students, Congress did not pre-empt more restrictive state constitutional provisions. It required federal officials to provide aid directly if "a local education agency is prohibited by law," 20 U.S.C. § 6320(e), from serving religious school students. The legislative history makes plain that in not preempting state law, Congress was respecting the validity of restrictive state church-state policies.[9] Just last year Congress included similar provisions in the No Child Left Behind Act, 20 U.S.C. § 7217a(d)(i) and 20 U.S.C. § 7882 (2002).

Similarly, the National School Lunch Program Act, 42 U.S.C. § 1756(b)[10] subsidizing religious, as well as public, schools, excused states from certain matching fund requirements with regard to religious schools if compliance would violate state law.

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9. S. Rep. 146, 89th Cong., 1st Sess. (1965), reprinted in 1965 U.S.C.C.A.N. 1446, 1468-69. See also the colloquy, 111 Cong. Rec. H.R. 5756-5758 (March 24, 1965); *id.* at 5734 (remarks of floor manager Rep. Powell).

10. First enacted in 1964, after *Sherbert v. Verner*, *supra*.

The first charitable choice law, guaranteeing the right of sectarian social service providers to compete equally with non-sectarian ones, does not "preempt any provision of a State constitution ... that prohibits or restricts the expenditure of State funds in or by religious organizations." 42 U.S.C. § 604a(k). The Conference report explained: "In some States, provisions of the State constitution ... prohibit the expenditure of public funds in or by sectarian institutions." 141 Cong. Rec. H 15407 (daily ed., December 21, 1995). This in the context of a federal statute whose constitutionality is premised on a view of church-state relations diametrically opposed to that of the state constitutional amendments it preserves.

II. ALTHOUGH "PLAY IN THE JOINTS" IS NOT UNLIMITED, WASHINGTON IS WELL WITHIN ITS LIMITS

A. The Denial Of A Subsidy Does Not Unconstitutionally Relegate Religion To Outlaw Status

The Free Exercise (and Equal Protection) Clauses do not become nullities because a state ensconces a restriction on its relations with religion in its constitution. It is therefore not surprising that this Court has invalidated state constitutional provisions even where defended on grounds of separation of church and state. "Play in the joints" is not unlimited. Some state provisions–but not the one at issue here–are irreconcilable with the federal Constitution.

"Play in the joints" does not extend so far as to allow states to relegate religious institutions to outlaw status. However, a refusal to subsidize an otherwise legal activity

does not do so. A refusal to provide cash subsidies is fundamentally different from a refusal to provide police and fire protection for religious institutions, *Everson v Bd. of Educ. supra*, 330 U.S. at 17-18; *Zelman, supra*, 536 U.S. at 640 (Souter, J., dissenting). An institution without such protection is literally outside the law. An institution merely denied a subsidy is not.

The provision of the basic amenities of civilized society raises no Establishment Clause concern at all. Withholding such fundamental services–for whose provision "governments are instituted among men"–from religious institutions would violate the Free Exercise or Equal Protection Clauses. But in the American constitutional tradition, the denial of a subsidy is not the equivalent of outlawry, nor is it even intolerable discrimination against a protected right. *Harris v. McRae*, 448 U.S. 297 (1980).

"Play in the joints" is also appropriate only where a state is in the gray area between the Establishment and Free Exercise Clauses. Elsewhere, though, "play in the joints" is not the appropriate rubric. A state cannot condition state office on a belief in God, *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961), nor bar ministers from serving in its legislature, *McDaniel v. Paty*, 435 U.S. 618 (1978), by invoking "play in the joints."

Torcaso may itself be an Establishment Clause decision, 367 U.S. at 495. In *Paty*, the issue of whether the Free Exercise Clause barred special restrictions on religion was squarely presented. The state constitutional ban on dual service as legislator (or constitutional convention

delegate) and minister was premised on a need to prevent clergy from trading on an official position to advance religion.

Tennessee could show no more than the merest possibility that a clergy-legislator might not separate the role of an advocate for faith from the role of a secular decision maker. There was no evidence that its fears were anything but a chimera. This Court refused to uphold an idiosyncratic prophylactic rule targeting the religiously observant as a constitutionally reasonable way of forestalling an illusory threat.

Washington's challenged rule, and the state constitutional policy it implements, is not prophylactic. The problem it avoids is not hypothetical, nor a slippery slope to merely possible future harm, but present state subsidization of religion. It is premised on a conception of separation of church and state which, as this Court's Reports demonstrate, has deep roots in American history. It is an appropriate occasion for invoking "play in the joints."

B. "Play In The Joints" Is Not Appropriate In Public Forum Cases

Cases involving religious speech in a government owned public forum, *Widmar v. Vincent*, 454 U.S. 263, 272-73 (1981) and *Good News Club v. Milford Central School*, 533 U.S. 98, 113 (2001), both applied compelling interest analysis to a religious exclusion commanded by state law. Neither case, however, is inconsistent with the existence of a "play in the joints" standard, because neither intruded into a constitutional gray area and hence could not be described as a manifestation of "play in the joints." More generally,

these cases do not involve a cash subsidy for religion, with the special historical concerns that evokes, *Mitchell v. Helms, supra.*

Second, in both *Widmar* and *Good News*, the issue was whether equal access to a forum by a religious speaker constituted impermissible government aid to religion. The Court, in those, as well as in other, forum access cases, *Rosenberger*, *supra* and *Board of Educ. of Westside Comm. Schools v. Mergens*, 496 U.S. 226 (1990), found no state involvement and no possibility of confusion about state involvement. *Cf. Capitol Square Review and Advisory Bd. v. Pinnette*, 515 U.S. 753 (1995) (majority holds private speech appearing to be government speech subject to Establishment Clause). Because these cases did not fall into a gray area, there was no call for consideration of "play in the joints."

Here, by contrast, there is no question that tax funds extracted and expended by the state do subsidize religious education. While the broad availability of that benefit, and its disbursement to a religious institution only as a result of private choice, attenuate the state's involvement to the point of federal constitutional acceptability, *Zelman*, *supra*, state responsibility for the transfer of state funds to a religious institution remains undeniable. Attenuation is not the equivalent of non-existence.

Without repeating the ground covered at length by Petitioners, it is a settled feature of American law that government refusal to subsidize speech or other activity is not the equivalent of a penalty for engaging in constitutionally protected activity, *U.S. v. American Library Ass'n*, *supra*; *Rust v. Sullivan*, 500 U.S. 173 (1991); *Regan v.*

Taxation With Representation, 461 U.S. 540 (1983). The precise limits of that principle have generated a complex body of decisions, and do not lend themselves to easy summation. Where such uncertainty prevails, "play in the joints" is the appropriate rule.

C. A State's Different View of Church-State Separation Can Be Compelling

The Court in *Widmar* declined to recognize Missouri's interest in achieving a greater separation between church and state than the federal Constitution provides as compelling enough to justify content-based speech discrimination. *Widmar*, *supra* at 276. It did not address, however, whether such an interest could be compelling in the context of a state's refusal to provide a subsidy for religious education.

Moreover, when *Widmar* was decided, the scope of the federal ban on aid to religious schools was far more robust than it is today. There was then a broad, federal no-aid rule, not a neutrality/private choice rule, *Mueller v. Allen*, 463 U.S. 388 (1983). Thus, a state anti-aid rule stricter than the federal rule could arguably be treated as overkill. As the *Mueller* neutrality/private choice rule has come to predominate, *Zelman v. Simmons-Harris*, however, the gap between the federal rule and the rule in states adhering to the older no-aid rule has grown far wider. It is not self-evident why a state may not declare that it has a public interest of the highest order, *Wisconsin v. Yoder*, 406 U.S. 205 (1971), in adhering to a different, older, vision of church-state relations.

Questions of the relations between institutions of government and those of faith are matters of the highest import, and are not merely matters of aesthetics, preference or practicality. Around the world they reach to the most profound questions of political and religious theory. Although not subject to empirical proof, questions of political and social theory can be compelling, as *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003), unambiguously holds. The proper ordering of church and state is such a question.

Given *Employment Division v. Smith*'s, holding that any neutral law, no matter how trivial, see, *e.g.*, *U.S. v. James*, 328 F.3d 953, 957-58 (7th Cir. 2003) (religious head coverings), overrides a believer's interest in practicing his or her religion under the Free Exercise Clause, it cannot be the case that the interest in freely practicing one's faith takes precedence over all other government interests, including keeping the state from intervening in religion. Nor is there any textual indication that the Free Exercise Clause, and the values it represents, must always and unfailingly prevail over any interest in restricting a state's interest in non-involvement or non-subsidization of church affairs.

III. THE FREE EXERCISES CASES ARE NOT DISPOSITIVE

Appellees' case rests primarily on three Free Exercise or Free Speech Clause cases: *Sherbert v. Verner*, *supra*; *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); and *Rosenberger v. Rector*, 515 U.S. 819 (1995). It would be a surprise if the Free Exercise Clause required the subsidization of religious education because that Clause is "written in terms of what the government cannot do to the individual, not what the individual can exact from the

government." *Lyng v. Northwest Indian Protective Ass'n*, 485 U.S. 439, 451 (1998), citing *Sherbert v. Verner*, *supra*, 374 U.S. at 412 (Douglas, J., concurring). Respondent's argument would also come as a surprise to Justice Brennan, who wrote for the Court in *Sherbert* (and those Justices who subsequently endorsed *Sherbert* in *Wisconsin v. Yoder*, 406 U.S. 205 (1972)) that his (or their) vote to hold South Carolina in violation of Ms. Sherbert's free exercise rights was in conflict with his (or their) joining the summary affirmances in *Brusca* and *Leutkemeyer*.

Sherbert, in any case, did not involve funding which flowed to a religious institution. Adelle Sherbert received unemployment benefits because she was unemployed, not because she was religious or attended church. Her church received nothing from the state. Religion was relevant only to the incidental question of whether Sherbert had good cause to turn down new (secular) employment.

Church of the Lukumi Babalu Aye v. City of Hialeah (*Lukumi*), *supra*, is even less helpful to Respondent than *Sherbert*. *Lukumi* repelled a rare regulatory effort to "suppress," 508 U.S. at 523, an unpopular religion. *Lukumi* is replete with references to the regulatory suppression of unpopular faiths, *e.g.*, 508 U.S. at 523-24, 534-35, 540, 542, 545-46. Nothing in that case suggests that the Court was thinking of the quite different problem of a state's refusal, in compliance with its own constitution, to subsidize religious education.

To ignore *Lukumi*'s facts, while quoting isolated snippets out of context, makes for appealing rhetoric and

poor law. *Lukumi* is not a bold and broad restatement of the religion clauses, sweeping away all that came before it.

Employment Division held that the Free Exercise Clause places no special limit on enforcement of generally applicable neutral laws which burden religious practice. *Lukumi* warned nevertheless that (1) the requirements of regulatory neutrality and general applicability have teeth; and (2) that both were to be judged realistically, not merely formally.

That leaves *Rosenberger v. Rector*, 515 U.S. 819 (1995), instantaneously distinguishable on the ground–repeated there twice–that it did not involve tax funds, and that its holding could not be extended to such funds, 515 U.S. at 841, 849.

This Court there also iterated that the student publication seeking funding was not a "'religious institution,' at least in the usual sense of that term as used in our case law, and it is not a religious organization as used in the University of Virginia's own regulations." 515 U.S. at 844; *id.* at 842. That is not true of Northwest College, to which Davey seeks a state payment. Those caveats cannot be dismissed as *dicta*. On the theory which carried the day below, the caveats in *Rosenberger* endorse line drawing which *prima facie* violates the Constitution.

Rosenberger, moreover, conceived of the subsidy there considered as creating a vigorous and capacious forum for speech, not one funding individual periodicals. This Court decided that case as if the problem was one of granting access to an existing forum. "The error made by the Court of Appeals ... lies in focusing on the money ... expended by

the government, rather than on the nature of the benefit received by the respondent." 515 U.S. at 843. And there, unlike here, no cash was transferred from state to a religious institution.

The benefit received by Davey is not access to a forum, but a paid theological education. *Widmar* and its progeny, culminating in *Zelman, supra*, hold that such a benefit would not violate the federal Establishment Clause. Neither *Rosenberger* nor any other case, including *Widmar*, holds that a state is barred from concluding that in such circumstances it is expending tax funds on religion in violation of its own fundamental charter. It is hardly a novel or radical idea in American political thought that paying for theological training is outside the purview of government. It would serve no useful function here to catalog the academic, historical and judicial treatments of the relevant, and hotly disputed, sources, as this Court has often canvassed that ground.

Respect for state dignity suggests that different responses to a crucial and disputed question of political philosophy ought not to be preempted by the federal government absent evidence—not present here—that such rigorous and unyielding preemption was intended.[11] "The [s]tates may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Grutter v. Bollinger, supra*, 123

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11. See *Zelman, supra*, 536 U.S. at 678-79, n. 4 (Thomas, J., concurring) (arguing that there is federalism component to the Establishment Clause).

S.Ct. at 2346, citing *U.S. v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

IV. WASHINGTON IS NOT SUPPRESSING RELIGIOUS IDEAS

The court below held that Washington "aim[ed] at the suppression of dangerous ideas," to wit, the religious viewpoints of Northwest College, 299 F.3d at 755. If that, and not preserving the independence of church and state from each other, were Washington's aim, it chose an odd way to do so.

Washington does not withhold grants from students who take religion courses or major in the academic study of religion. It does not withhold subsidies from students who take a course, or even several courses (including theology courses), taught from a religious point of view. It does not even withhold aid from students attending colleges where distinct religious viewpoints permeate the curriculum, *cf. Roemer v. Bd. of Public Works*, 426 U.S.736 (1976). Religious ideas are hardly condemned to an ideological gulag.

Washington, unlike the University of Virginia in *Rosenberger*, is not encouraging students to speak, but making available subsidies for the study of selected subjects. It is permitted great leeway in deciding where to direct its resources when granting subsidies. *U.S. v. American Library Ass'n*, *supra*,123 S.Ct. at 2303, 305 (Rehnquist, C. J.).

Washington is not penalizing the exercise of First Amendment rights as would denying veterans tax benefits to veterans affiliated with the Communist Party, *Speiser v. Randall*, 357 U.S. 513 (1958), or denying participation in government programs to women who have had an abortion,

Rust v. Sullivan, 500 U.S. 173 (1991). In those cases, the government would not be choosing what speech to subsidize, *U.S. v. American Library Ass'n*, *supra*, 123 S.Ct. at 2300 (collecting cases), but would be penalizing persons for speech or activities extraneous to the purposes of the subsidy. *National Endowment for Arts v. Finley*, 524 U.S. 569, 582-83, 587 (1998).

Davey was not penalized for being religious. Washington was simply refusing to pay for was his ministerial training. That is no more a burden on religion than failing to pay for an abortion is a burden on that constitutional right. *U.S. v. American Library Ass'n*, *supra*; *Harris v. McRae*, *supra*. Washington was insisting that the education, preparation and training of ministers was not an appropriate activity to subsidize with tax funds. That was surely a rational decision. No more is required when a government decides how to spend its own funds. *U.S. v. American Library Ass'n*, *supra* (plurality opinion).

V. WASHINGTON'S CONSTITUTION IS NOT ROOTED IN INVIDIOUS ANTI-CATHOLICISM

"Play in the joints" should not permit official discrimination against any religious group. The ban on the singling out of a religious group for unfavorable treatment is the "clearest command" of the Establishment Clause, *Larson v. Valente*, 456 U.S. 228, 244 (1982), situated at its core, not its periphery.

A plurality of this Court suggested in *Mitchell v. Helms*, *supra*, 530 U.S. at 829-830 (Thomas, J.) (plurality opinion), that much of the law barring aid to religious schools is rooted in rampant anti-Catholic bigotry of the 19th

century and hence is invalid. Other courts, *Kotterman v. Killian*, 193 Az. 273, 291, 922 P.2d 606, 624 (1999), *Society of Separationists v. Whitehead*, 870 P.2d 916 (Utah 1993), have endorsed that view of history.

That the nineteenth century debate over state aid to religious education revolved around subsidizing Catholic education is undeniable. These debates were sometimes tainted by raw anti-Catholicism, a taint enhanced by a witches' brew of anti-Irish and anti-immigrant feelings. See, W.M. McAfee, Religion, Race and Reconstruction (1998). It is true, too, that those seeking to reinforce the separation principle were largely Protestant and those opposed, largely Catholic.

It is a mistake, nevertheless, to conclude that these malignant ideas were the "but for" cause, *Hunter v. Underwood*, 471 U.S. 222, 228 (1985), of the restrictive state constitutional amendments collectively known as Blaine Amendments. The narrative of Blaine Amendments as anti-Catholicism *simpliciter* is grossly oversimplified.

The vigorous efforts to reinforce church-state separation did not arise in a vacuum, but were undertaken in response to positions of the Catholic Church as authoritatively enunciated by consecutive Popes in well-publicized encyclicals. Moreover, the Catholic Church for most of the 19th century found itself in opposition to almost every liberalizing democratic movement that arose in Europe. These positions, as well as the adoption in 1870 of

the doctrine of papal infallibility, were well-known to 19th century Americans.[12]

Collectively, these doctrines gave rise to a legitimate fear–which only in hindsight can be dismissed as unfounded–that the Catholic Church sought exclusive political power, and that, if it could, it would establish itself as the sole official church. Backers of Blaine Amendments were not challenging the modern Catholic Church after the Second Vatican Council accepted religious freedom and the separate roles of church and state, but a Church hostile to both ideas, each central to American constitutional thinking. Nineteenth century efforts to restate and reinforce Madisonian separation of church and state were not railing against a will-o-the-wisp, responding to the overheated imagination of demagogues, or scapegoating the innocent.

As early as 1832, Pope Gregory XIII, in his encyclical, *Mirari Vos*, denounced the idea of religious liberty as an "absurd and erroneous proposition."[13] His successor, Pope Pius IX, reiterated this criticism in the encyclical *Quanta Cura* (1864),[14] and the accompanying, and

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12. See also, D. Kertzer, The Kidnaping of Egardo Montara (1997); M. Borden, Jews, Turks and Infidels (1984) at 54-58 (describing American Jewish and Protestant reaction to kidnaping and forced baptism of Jewish child in Italy in 1860).

13. See J.T. Noonan, The Lustre of Our Country (1998) 360.

14. "And, against the doctrine of Scripture, of the Church, and of the Holy Fathers, they [*i.e.*, modernists] do not hesitate to assert that 'that is the best condition of civil society, in which no duty is recognized, as attached to the civil power, of restraining by

infamous, Syllabus of Errors. Error number 55 on the Syllabus was that "[t]he Church ought to be separated from the State, and the State from the Church."

Catholics recognized that these positions fueled opposition to the Church, sending up a "howl of indignation" from the press and prominent individuals such as William Gladstone, as Cardinal Martin Spalding acknowledged, J.A. Hennessey, American Catholics: A History Of The Roman Catholic Community In The U.S. (1981) at 164-65. L. Sewrey, The Alleged Un-Americanism Of The Church As A Factor In Anti-Catholicism In The U.S. (unpublished doctoral dissertation) (1954) at 12, 25-31, 88-90, citing, *inter alia*, William Gladstone, The Vatican Decrees In Their Bearing Upon Civil Allegiance 35 (1874).

Catholics made many efforts to explain away the Syllabus and the encyclicals, many emphasizing that they were not directed at the United States. Sewrey, *supra* at 81-90; Hennessey, *supra* at 164-65. Even a friendly observer

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enacted penalities [*sic*], offenders against the Catholic religion, except so far as public peace may require.' From which totally false idea of social government they do not fear to foster that erroneous opinion, most fatal in its effects on the Catholic church and the salvation of souls, called by Our Predecessor, Gregory XVI, an 'insanity,' *viz* that 'liberty of conscience and worship is each man's personal right, which ought to be legally proclaimed and asserted in every rightly constituted society; and that a right resides in the citizens to an absolute liberty ... whereby they may be able openly and publicly to manifest and declare any of their ideas whatever ....' But, while they rashly affirm this, they do not think and consider that they are preaching 'liberty of perdition' ...."

such as Sewrey notes of the church's critics, however, that "[t]he tendency to attribute to Catholics only a half-hearted commitment to American ideals acquires a certain degree of plausibility." *Id.* at 81. See also, J.T. Noonan, The Lustre of Our Country (1998) at 28 (criticizing post-World War II critics of pre-Vatican II church teaching on religious liberty, but noting "critics' distrust was genuine, and the doctrine they exploited had once been operative").

This being the case, it can hardly be said that the anti-Catholic rhetoric of the 19th century was nothing more than crude bigotry. By official papal pronouncement, the Church sought a radically different church-state settlement than prevailed in the United States.

Defenders of the existing order were legitimately entitled to forestall the possibility that, contrary to the protestations of American Catholics, the Church's authoritative spiritual leader was to be taken seriously; that aid to Catholic religious schools was part of a "seamless whole" with the Church's negative view of church-state separation; and that additional safeguards against such a contingency were urgently required.

The Catholic Church had every right to advance its political positions, *Paty*, *supra*. But its opponents were not forced by the First Amendment into silence. They were entitled to respond vigorously to its efforts without being subsequently condemned as bigots.

Whether those efforts to forestall a Catholic establishment were wise or not, whether the fears which fueled those concerns could have been otherwise deflected, the legitimate roots of that effort stand in stark contrast to

the raw bigotry which marked the disenfranchisement of blacks condemned in *Underwood*.

CONCLUSION

For the reasons stated, the judgment should be reversed.

Respectfully Submitted,

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July 17, 2003